

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Z-TEL COMMUNICATIONS, INC.	}	
	}	
Complainant	}	
	}	
vs.	}	Docket No. 02-0160
	}	
ILLINOIS BELL TELEPHONE COMPANY, d/b/a AMERITECH ILLINOIS	}	
	}	
Respondent	}	

AMERITECH ILLINOIS' REPLY BRIEF ON REHEARING
ON THE ISSUE OF PENALTIES

Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech Illinois") files this Reply Brief in response to the Briefs of Z-Tel Communications, Inc. ("Z-Tel") and Staff filed on September 26, 2002.

I. PENALTIES MAY NOT BE IMPOSED UNDER SECTION 13-305 IN THIS PROCEEDING.

In its Initial Brief, Ameritech Illinois cited the statutory language in Sections 13-514, 13-515, 13-516 and 13-801, which indicates that penalties for violations of Section 13-801 may be assessed under Section 13-516. Specifically, Section 13-514(11) makes a violation of Section 13-801 a *per se* violation of Section 13-514, which may be enforced under Section 13-515, and which is subject to penalties under Section 13-516(a)(2). Furthermore, Section 13-801(k) states that the Commission "shall" determine any matters in dispute under Section 13-801 "pursuant to Section 13-515 of the Act."

Section 13-305 authorizes penalties “in a case in which a civil penalty is not otherwise provided for in this Act.” Since Section 13-516 authorizes penalties for a violation of Section 13-514(11), *i.e.*, a violation of Section 13-801, penalties are “otherwise provided for” in the Act and may not be imposed pursuant to Section 13-305.

In its response, Z-Tel argues that violations of Section 13-514(11) and Section 13-801 are separate and different offenses. Z-Tel asserts that the Commission held in its Order that the violation of Section 13-801 was independent of the violation of Section 13-514(11). (Z-Tel Br. at 5). Therefore, according to Z-Tel, while a violation of Section 13-801 may be penalized under Section 13-516(a)(2) as a violation of Section 13-514(11), it may also be separately penalized under Section 13-305 as a violation of Section 13-801.

Z-Tel’s argument (and a similar argument by Staff) is without merit. The only conduct that violates Section 13-514(11) is conduct that violates Section 13-801. Without a violation of Section 13-801, there is no violation of Section 13-514(11). Therefore, when the Commission penalizes a carrier for violating Section 13-514(11), it is by definition penalizing the carrier for conduct committed in violation of Section 13-801, and for nothing else. Since the Commission may penalize a carrier under Section 13-516 for conduct in violation of Section 13-801, it may not also penalize that conduct under Section 13-305 since that section applies only “in a case in which a civil penalty is not otherwise provided for in this Act.” 220 ILCS 5/13-305.

Z-Tel argues further that Section 13-305 is mandatory and that the Commission must impose penalties pursuant to that Section for violation of Section 13-801. There are two flaws in this argument. First, assuming Section 13-305 were mandatory, it still would be mandatory only in those situations where it applied, and this is not one of them. Z-Tel totally ignores the language in Section 13-305 that it applies only “in a case in which a civil penalty is not otherwise provided for in this Act.” 220 ILCS 5/13-305.

Second, contrary to Z-Tel’s interpretation, penalties are not mandatory under Section 13-305. Section 13-305 merely describes the circumstances in which penalties may be imposed and the maximum penalties that may be imposed. Section 13-304 governs whether and how the Commission imposes penalties authorized by Section 13-305. Section 13-304 grants the Commission broad discretion to determine whether to initiate a penalty proceeding and whether and to what extent penalties should be imposed.

The language Z-Tel cites from Section 13-305 (Z-Tel Br. at 6) states that a carrier “shall be subject to a civil penalty imposed in the manner provided in Section 13-304.” 220 ILCS 5/13-305. This language states only that the carrier shall be “subject to” a penalty proceeding. It does not state that the Commission “shall” initiate a penalty proceeding under Section 13-304 or that it “shall” impose penalties.

For its part, Staff argues that penalties for violation of Section 13-801 “can be assessed under Section 13-516 as well as Section 13-305.” (Staff Br. at 2). Staff ignores the mandate of Section 13-305 that penalties may be assessed

under Section 13-305 only “in a case in which a civil penalty is not otherwise provided for in this Act.” 220 ILCS 5/13-305. Since, as Staff concedes, penalties for violation of Section 13-801 may be assessed under Section 13-516 as a violation of Section 13-514(11), they may not also be assessed under Section 13-305.

Staff’s emphasis (Staff Br. at 4) on the phrases “In addition to any other provisions of this Act” and “Notwithstanding any other provision of this Act” in Sections 13-516(a) and 13-516(a)(2), respectively, is misplaced. Those sections might be relevant if the Commission were seeking to impose penalties pursuant to Section 13-516. However, the Commission is not seeking to impose penalties under Section 13-516 in this proceeding. It is seeking to impose penalties under Section 13-305 and can only do so in accordance with the terms of that Section. That section by its own terms does not apply when penalties are otherwise provided for in the Act.

Staff states, “It is illogical to construe the Act so as to provide for no penalties for a direct violation of Section 13-801.” (Staff Br. at 3). However, Section 13-514 treats a violation of Section 13-801 as a violation of Section 13-514 that is subject to penalties under Section 13-516(a)(2). Section 13-516(a)(2) expressly states that penalties may be imposed only for a second and subsequent offense. The only reason that Ameritech Illinois is not subject to penalties in this proceeding for its violation of Section 13-801 is that this was its first offense. What is illogical is Staff’s attempt to circumvent the General

Assembly's explicit determination that a first offense should not be subject to civil penalties.

Staff argues there is no requirement to pursue a violation of Section 13-801 under Section 13-514. Staff contends that a violation of Section 13-801 also could be pursued in a complaint case under Section 10-108. Staff asserts that Ameritech Illinois' position would improperly preclude penalties under Section 13-305 in such a complaint case. (Staff Br. at 3).

First of all, Staff provides no support for its argument that violations of Section 13-801 may be pursued in complaint cases under Section 10-108. Section 13-801(k) states that the Commission "shall" determine any matters in dispute under Section 13-801 "pursuant to Section 13-515 of this Act." 220 ILCS 5/13-801(k). In the absence of a clearly expressed contrary intent, use of the word "shall" means the requirement is mandatory. *Village of Winfield v. Illinois State Labor Relations Board*, 176 Ill. 2d 54, 64, 678 N.E.2d 1041 (1997); *People v. Thomas*, 171 Ill. 2d 207, 222, 664 N.E.2d 76 (1996). Here, Section 13-801 and Sections 13-514, 13-515 and 13-516 are closely related, and use of the word "shall" clearly indicates that the legislature intended the procedure under Section 13-515 to be mandatory.¹

Second, even if it were assumed that a complaint for violation of Section 13-801 could be filed under Section 10-108 and penalties could be imposed

¹ Staff opines that a carrier with a weak case might prefer to file under Section 10-108 rather than Section 13-515 in order to avoid sanctions under Section 13-515(j) for filing a frivolous complaint. (Staff Br. at 3). In other words, Staff argues that the legislature did not intend the procedure under Section 13-515 to be mandatory because, otherwise, the complainant would not be able to circumvent the sanctions the legislature established to discourage frivolous complaints. Staff does not explain why the legislature would simultaneously establish sanctions for frivolous complaints and a procedure that would render them nugatory.

under Section 13-305 in that proceeding, it still would not change the outcome in this proceeding. This proceeding was filed under Section 13-515, and in this proceeding, the penalty provisions of Section 13-516 clearly govern; Section 13-305, therefore, is inapplicable.

II. THE COMMISSION SHOULD DECLINE TO INITIATE A PENALTY PROCEEDING EVEN IF IT IS OTHERWISE PERMITTED BY LAW.

In its initial brief, Ameritech Illinois argued that even if penalties for violation of Section 13-801 could be assessed under Section 13-305, the Commission should determine on the existing record that a penalty proceeding should not be initiated. Staff and Z-Tel contend that Ameritech Illinois' argument is premature and should be addressed in the penalty proceeding.

Ameritech Illinois acknowledges that if a penalty proceeding were conducted, the issues it raised in its initial brief related to intent, good faith, diligence, compliance and financial harm should and necessarily would be addressed in that proceeding, and additional evidence would be presented. However, the Commission has broad authority under Section 13-305 to determine in the first instance whether even to initiate a penalty proceeding. The current record is more than sufficient to support—and in fact to require—a finding that penalties are not appropriate here.

Ameritech Illinois cited a number of cases in which penalties imposed by regulatory agencies were overturned as a matter of law because the underlying facts did not demonstrate bad faith, intentional misconduct or the higher degree of culpability that must be established to justify civil penalties. Metropolitan

Sanitary District v. Pollution Control Bd., 62 Ill. 2d 38, 46 (1975); Southern Illinois Asphalt Co. v. Pollution Control Bd., 60 Ill. 2d 204, 208-217 (1975); Itasca Public School Dist. v. Ward, 179 Ill. App. 3d 920, 925-26 (1st Dist. 1989); City of Moline v. Pollution Control Bd., 133 Ill. App. 3d 431, 434 (3d Dist. 1985); City of Chicago v. Pollution Control Bd., 57 Ill. App. 3d 517, 522-23 (1st Dist. 1978); Tri-County Landfill Co. v. Pollution Control Bd., 41 Ill. App. 3d 249, 259-60 (2d Dist. 1976).

A comparison of the facts described in those cases with the evidentiary record in this proceeding supports the conclusion that penalties are not legally warranted in this proceeding either.

III. THE COMMISSION MAY NOT IMPOSE PENALTIES FOR CONDUCT OCCURRING BEFORE MAY 8, 2002.

Assuming *arguendo* that the Commission were authorized to initiate a penalty proceeding under Section 13-305 and chose to do so, penalties could not be imposed in that proceeding for conduct occurring before May 8, 2002.

Section 13-305 states that penalties “begin to accrue from the day after written notice is delivered to such party or parties that they are in violation of or have failed to comply with this Act or an order, decision, rule, regulation, direction or requirement of the Commission, or a part or provision thereof.” 220 ILCS 5/13-305. The Commission’s first written notice to Ameritech Illinois that it was in violation of Section 13-801 was the Commission’s May 8, 2002 Final Order. Consequently, penalties may not be imposed under Section 13-305 for conduct occurring before that date.

Staff does not dispute the requirement for written notice in Section 13-305. Staff also does not dispute the legislative history indicating that the Commission must provide the notice. Instead, Staff argues the Commission should ignore the legislative history “because the language of the Act is clear.” (Staff Br. at 6). Staff does not explain how a statute that is silent on the subject of who should provide the notice can be considered clear on that subject.

The cardinal rule of statutory construction, to which all other canons and rules are subordinate, is to ascertain and give effect to the true intent and meaning of the legislature. *People ex rel Hanrahan v. White*, 52 Ill. 2d 70, 73, 285 N.E.2d 129, 130 (1972); *Stewart v. Industrial Commission*, 115 Ill. 2d 337, 341, 504 N.E.2d 84, 86 (1987). Here, the legislature’s intent is not in doubt because the legislative history expressly states that penalties begin to accrue “one day after a carrier receives notice from the ICC”. State of Illinois, 92nd General Assembly, House of Representatives, Transcription Debate, May 31, 2001, p. 33 (emphasis supplied).

Even if the Commission were to interpret the notice requirement in Section 13-305 without resort to the legislative history, the result would be the same. Section 13-305 must be read in conjunction with Section 13-304. Section 13-304 describes the Commission’s authority to assess and collect civil penalties and the circumstances it should consider in determining whether or in what amount to assess civil penalties. It states that except for tax penalties, civil penalties may be assessed only after “notice” and opportunity to be heard. 220 ILCS 5/13-304. Section 13-305 describes the improper conduct for which the Commission may

impose penalties and the maximum amount of penalties that may be imposed. It provides that penalties attach and begin to accrue from the day after “written notice” of violation is delivered to the offending party. 220 ILCS 5/13-305. The Commission is the only entity authorized by Sections 13-304 and 13-305 to take specific actions to assess and collect civil penalties. Thus, when Section 13-304 requires “notice” and Section 13-305 requires “written notice” of violation, it is understood that those notices must be provided by the Commission. If the legislature had intended some other entity to provide the notice, it necessarily would have identified that entity.

Staff also argues that whether the required notice was given under Section 13-305 is beyond the scope of this rehearing proceeding because the Commission’s Order “made absolutely no findings as to the issue of when penalties begin to accrue.” (Staff Br. at 6). Z-Tel agrees. (Z-Tel Br. at 11). Staff and Z-Tel argue that the notice issue should be addressed in the penalty proceeding.

While the notice issue could be addressed in a penalty proceeding if it were not resolved here, the issue is properly before the Commission and ripe for decision. The Commission’s Order determines that Ameritech Illinois violated Sections 13-514 and 13-801 by its conduct occurring prior to issuance of the Commission’s Order and further concludes that a penalty proceeding should be initiated to determine whether penalties should be assessed with respect to that conduct. Thus, while the Commission’s Order does not mention the notice requirement of Section 13-305, it implicitly concludes that penalties may be

assessed for conduct occurring prior to the Commission's Order. Since the Commission's Order was the first written notice of violation from the Commission, the implicit conclusion in the Order is erroneous and should be corrected on rehearing.²

Z-Tel responds to the notice issue with a lengthy argument that Z-Tel's complaint in the Section 13-515 proceeding satisfied due process requirements for notice to Ameritech Illinois. (Z-Tel Br. at 12-15). Ameritech Illinois has not presented a due process issue. The issue is not whether Ameritech Illinois received adequate notice of a complaint, but instead whether the statutory requirement for written notice of violation has been satisfied. Z-Tel's due process arguments are not relevant to that statutory issue.³

Finally, Z-Tel asserts that the Commission gave the required written notice of violation in its February 27, 2002 Order granting Emergency Relief. Once again, however, Z-Tel makes a due process argument rather than a statutory argument. The Commission's February 27, 2002 Order does not provide a written notice of violation of the Act or a Commission order. It finds that Z-Tel has shown a likelihood of success on the merits of its complaint sufficient to warrant emergency relief, but makes clear that the emergency relief is interim pending a hearing on the merits.

² Of course, this issue becomes moot if Section 13-305 is properly construed as being inapplicable to violations of Section 13-801.

³ Z-Tel asserts, "It is undisputed that Z-Tel's Complaint and Request for Emergency Relief specifically alleged that Ameritech's failure to provide accurate and discriminatory [sic] 836 LLNs was a violation of Section 13-801 and that Z-Tel sought penalties under Section 13-305." (Z-Tel Br. at 16). This statement is untrue with respect to Section 13-305. Neither Z-Tel's complaint nor its amended complaint made any reference to Section 13-305. The only penalty provision cited in the complaint and amended complaint was Section 13-516. Nor was Section 13-305 mentioned in Z-Tel's Briefs.

In attempting to construe its complaint or the Commission's Order granting emergency relief as the notice required by Section 13-305, Z-Tel is attempting to fit a square peg into a round hole. That is because the procedures prescribed in Section 13-515 were written with specific reference to the penalty provisions of Section 13-516 but have no application to Section 13-305.

IV. CONCLUSION

Section 13-514(11) expressly provides that a violation of Section 13-801 shall be treated as a violation of Section 13-514. Section 13-801(k) expressly provides that Section 13-801 shall be enforced pursuant to Section 13-515. Under Section 13-516(a)(2), penalties may be imposed for a violation of Section 13-514(11), *i.e.*, a violation of Section 13-801. Because Ameritech Illinois may be penalized under Section 13-516(a)(2) for conduct violating Section 13-801, it may not be penalized separately for the same conduct under Section 13-305. That section provides for penalties only “in a case in which a civil penalty is not otherwise provided for in this Act.”

Although Ameritech Illinois is subject to penalties under Section 13-516(a)(2) for its violation of Section 13-801, the Commission's Order held that a penalty proceeding could not be initiated pursuant to Section 13-516(a)(2) because this was Ameritech Illinois' first offense since passage of the amended Act. The Commission's holding was correct and has not been challenged on rehearing.

The Commission also held however, that Ameritech Illinois could be subject to penalties under Section 13-305. That holding should be corrected. It is inconsistent with the express language of Section 13-305, which makes Section 13-305 inapplicable when penalties are provided for under another section of the Act, and it is inconsistent with the Legislature's intention to exempt from penalties a carrier's first violation.

WHEREFORE, Ameritech Illinois respectfully requests the Commission to modify its Final Order to eliminate the finding and ordering paragraphs that require the initiation of a penalty proceeding pursuant to Sections 13-304 and 13-305 of the Act for any or all of the following reasons:

A. Penalties may not be imposed under Section 13-305 because Ameritech Illinois is subject to penalties under Section 13-516(a)(2) for violations of Sections 13-514 and 13-801;

B. The record in this proceeding viewed as a whole does not establish bad faith, intentional misconduct or other higher degree of culpability sufficient to warrant the exercise of the Commission's discretion to initiate a penalty proceeding even if such a proceeding were otherwise authorized; and

C. Penalties may not be imposed under Section 13-305 for the misconduct found in this proceeding because such misconduct occurred prior to receipt by Ameritech Illinois of written notice from the Commission that it was in violation of the Act.

Respectfully submitted,

Ameritech Illinois

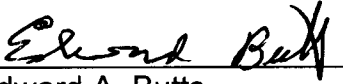
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Notice of Filing and Certificate of Service

The undersigned, an attorney, certifies that Ameritech Illinois' Reply Brief on Rehearing on the Issue of Penalties was filed with Donna Caton, Chief Clerk of the Illinois Commerce Commission, by e-docket and copies were served on each person on the attached Service List by electronic mail on October 2, 2002.


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